Supreme Court, U.S.
FILED
JAN 14 2000
CLERK

(3)

No. 99-942

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1999

---

NATIONAL AMERICAN INSURANCE COMPANY
*and*
GULF INSURANCE COMPANY,
*Petitioners,*
v.
RUPPERT LANDSCAPE COMPANY, INC.,
*Respondent.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

---

## REPLY TO BRIEF IN OPPOSITION

---

RICHARD G. MANN, JR.
WATT, TIEDER, HOFFAR
& FITZGERALD, L.L.P.
7929 Westpark Drive, Suite 400
McLean, Virginia 22102
(703) 749-1000
*Attorneys for Petitioners*

January 14, 2000

## QUESTION PRESENTED

Are claims for injuries to a private party's business preempted by a bankruptcy trustee's unasserted potential claim under 11 U.S.C. § 548 for a related fraudulent conveyance without a showing of interference with the bankruptcy estate?

## PARTIES TO THE PROCEEDING

Petitioner National American Insurance Company is not a publicly held entity, but is a wholly owned subsidiary of Chandler Insurance Company, Ltd., which is publicly held. Petitioner Gulf Insurance Company is not a publicly held entity. Citigroup (the ultimate controlling entity of Gulf) and Travelers Property Casualty Corporation (an intermediate holding company of Gulf), which are publicly held corporations, each own at least ten percent of Gulf Insurance Company.

## TABLE OF CONTENTS

Page

QUESTION PRESENTED . . . . . i

PARTIES TO THE PROCEEDING . . . . . ii

TABLE OF CONTENTS . . . . . iii

TABLE OF AUTHORITIES . . . . . iv

I. THE SURETIES' CLAIMS ARE NOT ASSETS OF THE BANKRUPTCY ESTATE . . . . . 2

II. CONCLUSION . . . . . 5

## TABLE OF AUTHORITIES

**Cases:** Page

*Caplin v. Marine Midland Grace Trust Company,*
406 U.S. 416 (1972) . . . . . 4,5

*E.F. Hutton & Co. v. Hadley,*
901 F.2d 979 (11th Cir. 1990) . . . . . 5

*Fisher v. Apostolou,*
155 F.3d 876 (7th Cir. 1998) . . . . . 5

*Litchfield Co. v. Anchor Bank,*
135 B.R. 797 (W.D.N.C. 1992) . . . . . 5

*Williams v. California 1st Bank,*
859 F.2d 664 (9th Cir. 1988) . . . . . 5

**Statutes:**

11 U.S.C. § 548 . . . . . 4

No. 99-942

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1999

---

NATIONAL AMERICAN INSURANCE COMPANY
*and*
GULF INSURANCE COMPANY,
*Petitioners,*
v.

RUPPERT LANDSCAPE COMPANY, INC.,
*Respondent.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

---

## REPLY TO BRIEF IN OPPOSITION

---

National American Insurance Company ["National"] and Gulf Insurance Company ["Gulf"], [collectively the "Sureties"], respectfully submit the

following in reply to the Brief in Opposition of Ruppert Landscape Company, Inc. ("Ruppert").

## I
## THE SURETIES' CLAIMS ARE NOT ASSETS OF THE BANKRUPTCY ESTATE

The three arguments in Ruppert's Brief in Opposition are undergirded on the mistaken assertion that the Sureties' claims are assets of Green Thumb's bankruptcy estate and, therefore, that only the trustee has standing to assert the claims. In fact, the personal and particular nature of the torts and damages suffered by the Sureties demonstrates the fallacy of the Fourth Circuit's analysis and the need for clear guidance from this Court.

The following passages from the Brief in Opposition underscore Ruppert's reliance on the mistaken belief that the Sureties' claims are assets of the estate: "The Trustee, on behalf of the bankruptcy estate, owns all such causes of action." Brief in Opposition at 5; "there is nothing in the record, which demonstrates that the claim of the Sureties was not a general claim, the recovery of which would be for the common benefit of all creditors." Id. at 6; "the cause of action, if any, therefore belongs to the estate and had to be prosecuted and administered by the Trustee unless abandoned by the Trustee." Id. at

9; "The holding of the Fourth Circuit Court of Appeals [in this action] is that where the cause of action belongs to the bankruptcy estate, the Trustee has standing to bring the action to protect the interests of all the creditors of the bankruptcy. The corollary to this holding is that where the cause of action does not belong to the bankruptcy estate, the trustee lacks standing to bring the action and the creditor is free to bring the action independent of the Trustee." Id. (emphasis supplied); "The suit, which the Sureties brought, was an asset of the bankrupt's estate to be administered by the trustee in the bankruptcy court." Id.; "The trustee's role is to bring suits such as these on behalf of all the creditors." Id. at 10; "Only by ensuring that the action is brought by the trustee in the bankruptcy court, can the asset be effectively administered on behalf of all the creditors." Id. at 11.

In fact, the Sureties' complaint alleges claims of tortious interference with contract, statutory and common law conspiracies between Ruppert and Green Thumb to injure the Sureties, and successor liability. With the possible exception of the successor liability count, all of these claims are clearly personal and particular to the Sureties, especially when viewed in conjunction with the requested relief. The Sureties are seeking compensatory damages for injuries to their businesses as well as punitive and statutory treble damages. These claims are not assets of the bankruptcy estate seeking a return of

the assets transferred to Ruppert or the value of the transferred assets. It is clear that the estate is not entitled to recover from Ruppert the bond losses incurred by the Sureties arising from Ruppert's tortious interference and conspiracies.

Ruppert's argument and the Fourth Circuit's holding place trustees in exactly the position this Court prohibited them from taking in Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416 (1972). The Court in Caplin prohibited trustees from "collect[ing] money not owed to the estate." Id. at 428.

Ruppert also contends that the trustee had preemptive standing to assert the Sureties' claims because "11 U.S.C. § 548 expressly authorizes the trustee to examine all transactions with the debtor and to seek to avoid any such transaction if made 'with actual intent to hinder, delay, or defraud.'" Brief in Opp. at 5. Nothing in section 548,[1] however, grants authority to bankruptcy trustees to seek the type of personal damages sought by the Sureties. The trustee for Green Thumb's bankruptcy estate could seek to avoid the transaction with Ruppert and return of the transferred assets or their value; he could not recover on behalf of the estate any of the Sureties' personal losses.

---

[1]Section 548 is set forth in full at page 19 in the Appendix to the Petition for a Writ of Certiorari.

Finally, Ruppert and the Fourth Circuit seem to agree that the relationship between the Sureties' claims for personal damages and the trustee's potential suit for fraudulent conveyance somehow renders the Sureties' claims assets of the bankruptcy estate. Similar alchemy was rejected by this Court in Caplin and by decisions of other circuit courts of appeals. E.g., Fisher v. Apostolou, 155 F.3d 876, 879-883 (7th Cir. 1998); E.F. Hutton & Co. v. Hadley, 901 F.2d 979, 985 (11th Cir. 1990); Williams v. California 1st Bank, 859 F.2d 66, 667 (9th Cir. 1988). A trustee does not have standing to assert claims that are not part of the bankruptcy estate regardless of the relationship between those claims and the estate.

Nonetheless, where prosecution of the related claims could interfere with the administration of an estate, a trustee may seek an order staying prosecution of the related claims. E.g., Fisher v. Apostolou, supra, 155 F.3d at 882-883; Litchfield Co. v. Anchor Bank, 135 B.R. 797, 804 (W.D.N.C. 1992). Here, however, the trustee did not request such a stay, no finding of interference was made, and the district court dismissed the sureties' claims with prejudice rather than order a temporary stay of prosecution. In affirming the district court's order of dismissal, the Fourth Circuit contravened this Court's guidance in Caplin, created a split of opinion among the circuits and ratified an injustice (the deprivation of

the Sureties' personal claims) likely to be repeated without further guidance from the Court.

## II
## CONCLUSION

Accordingly, the Sureties respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,

RICHARD G. MANN, JR.
WATT, TIEDER, HOFFAR
& FITZGERALD, L.L.P.
7929 Westpark Drive,
Suite 400
McLean, Virginia 22102
(703) 749-1000
*Attorneys for Petitioners*